

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - x
: UNIVERSAL CITY STUDIOS, INC., :
: plaintiff, : 82 CIV. 4259 (RWS)
: vs. :
: November 8, 1984
: NINTENDO CO., LTD. and :
: NINTENDO OF AMERICA, INC., :
: Defendants. :
: - - - - - x

DEPOSITION OF MICHAEL S. SCHWEFEL

A p p e a r a n c e s :

For the Plaintiff:

TOWNLEY & UPDIKE
405 Lexington Avenue
New York, New York 10017
By: DOUGLAS C. FAIRHURST, ESQ.

For the Defendants:

MUDGE, ROSE, GUTHRIE, ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
By: JOHN J. KIRBY, JR., ESQ.
CATHERINE E. PALMER, ESQ.

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111 Gilet Street
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1 concerning Donkey Kong.

2 Q To the best of your knowledge was Donkey Kong
3 a game that was being marketed and sold in the United States
4 prior to the time that Coleco and Nintendo entered into their
5 license agreement?

6 A I don't know how many months this oral agreement
7 went prior to it. Either they were already marketing in the
8 United States, or they were contemplating marketing very
9 soon.

10 MR. KIRBY: I'm going to ask the Reporter to
11 mark as Defendants' 125 and 126 two documents both
12 headed Trademark and Copyright License Agreement.
13 The one I am asking her to mark as 125 also bears
14 the stamp "Confidential."

15 MR. FAIRHURST: Off the record.

16 (Discussion off the record.)

17 MR. KIRBY: Back on the record. Thank you, Mr.
18 Fairhurst.

19 Mr. Fairhurst has pointed out what I had
20 asked to be marked as 125 and 126 have previously
21 been marked in connection with the deposition
22 of Mr. Arakawa as Plaintiff's 8 and Plaintiff's 9.

23 BY MR. KIRBY:

24 Q Mr. Schwefel, let me show you what has been marked
25 as Plaintiff's Exhibit 8, and ask you to review that quickly.

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1 The signature page is page 23.

2 A I have.

3 Q Is that the trademark and copyright license agreement,
4 one of them, with Nintendo with respect to Donkey Kong to
5 which you referred?

6 A I believe it is.

7 Q Would you look at Plaintiff's 9, and I ask you if
8 that is another trademark and copyright license agreement
9 between Nintendo and Coleco with respect to Donkey Kong?

10 A It appears to be.

11 Q To your knowledge did Nintendo and Coleco enter
12 into any other trademark and copyright license agreements
13 with respect to Donkey Kong other than the two agreements
14 which you have before you, Plaintiff's 8 and Plaintiff's 9?

15 A Yes, I believe we entered into an additional
16 agreement with Nintendo to produce action figure toys.

17 Q Was that entered into subsequent to February 1, 1982?

18 A Yes.

19 Q Now, Mr. Schwefel, I understand from your testimony
20 that prior to February 1, 1982 Coleco had an oral agreement
21 with Nintendo with respect to Donkey Kong?

22 A That's correct.

23 Q Who was the Coleco employee who make that oral
24 agreement?

25 A Eric Bromley.

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Q Can you give me your best estimate as to how many months prior to February 1, 1982 that agreement was made?

A My recollection, the agreement was made between September and November 1981.

Q From the time of the oral agreement until the time of the written contract of February 1, 1982, did Coleco expend any effort or otherwise work upon the Donkey Kong project?

A Yes.

Q Did that work consist of developing or beginning development of a home video cartridge?

A That's correct.

Q Did it consist of work on the tabletop game?

A I believe it did.

Q By the time this agreement was signed on February 1, 1982 had Coleco developed a home video cartridge to the best of your knowledge for Donkey Kong?

A I don't know if our development was completed. I really am not sure what stage it was. It possibly could have been.

I don't have a recollection how specific, or at what stage it was. We were doing a lot of work on it. We were doing marketing work and merchandising work.

Q Do you remember whether there was a toy fair in New York in 1982?

1 A There's a toy fair every year in New York.

2 Q When during the course of the year is that toy
3 fair held?

4 A Usually in February or March.

5 Q In 1983 at the New York toy fair did Coleco in any
6 way announce its plans to sell a Donkey Kong home video game?

7 MR. FAIRHURST: Objection; form, foundation.

8 THE WITNESS: Announce is a difficult word.

9 It gives the implication it was done for the first
10 time. I believe we told the world before that date
11 that Donkey Kong was going to be manufactured and
12 produced by Coleco.

13 I think those announcements, at least semi-
14 publicly, started in the fall of 1981 and,
15 certainly, publicly, by the end of the year; and in
16 the month of January probably at the Consumer
17 Electronics Show.

18 BY MR. KIRBY:

19 Q Where was the Consumer Electronics Show?

20 A My understanding is there are two a year. There is
21 one in June and one in January. All the January shows are in
22 Las Vegas.

23 Q Did you attend the Consumer Electronics Show in
24 1982?

25 A No, I did not.

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13
1 Q Did you attend the Toy Fair in New York in 1982?

2 A Yes, I did.

3 Q If I recall, when did Coleco first show to the trade
4 the Donkey Kong cartridge?

5 A Let me define my answer.

6 Q Please.

7 A In the sentence when you use the word "cartridge,"
8 I'm not talking about a completed, finished unit to be sold.
9 I'm sure we started telling the trade about our plans to make
10 a Donkey Kong cartridge as soon as we secured the oral
11 understandings which were confirmed by telexes and payment of
12 money in 1981.

13 As far as my understanding goes, and knowing the
14 nature of our sales and marketing departments of the company,
15 we were promoting the product almost immediately.

16 Q During the time that the process of promoting the
17 Donkey Kong product was underway in the fall of 1981 and
18 winter of '82 did Coleco have underway discussions with any
19 other company about licensing characters or other products
20 for home video game developments?

21 A Absolutely, yes.

22 Q Can you name any companies with which it was
23 having discussions?

24 A Centuri, Midway Bally, Exidy. I'm sure many, many
25 more.

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1 Q Any discussions with any movie companies?

2 A Yes.

3 Q Can you name any movie companies you had discussions
4 with?

5 A Paramount, MCA, possibly MGM.

6 Q Is MCA the parent company to Universal, to your
7 knowledge?

8 A I believe it is.

9 Q Who is Mr. Al Kahn?

10 A Mr. Al Kahn is an employee of Coleco. His current
11 title is Executive Vice President - Toys.

12 Q Was Mr. Al Kahn during the fall of '81 and the
13 winter of '82 having discussions about various possible
14 commercial relationships with Universal/MCA?

15 A I believe he was.

16 Q Do you know whether he was or not?

17 A I've learned to my knowledge after those
18 discussions took place that he did by seeing correspondence
19 in other documents. At the time it was just a belief, which
20 was confirmed by a review of the documents.

21 Q Mr. Schwefel, I know you're a lawyer. If you're like
22 me, sometimes it's more difficult for lawyers to testify than
23 it is for anyone else.

24 When you say, "belief," do you mean that you
25 believe because Mr. Kahn told you he was having discussions

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1 with Coleco at Universal/MCA at the time he was having them?

2 A I don't know if my discussions with Mr. Kahn took
3 place contemporaneously or thereafter.

4 MR. FAIRHURST: I have to object to the form
5 of the question and the witness' response. The
6 record, as it now appears, I don't believe Mr.
7 Kirby and Mr. Schwefel have communicated in the
8 last one. If you want to try it again, it's up to
9 you.

10 BY MR. KIRBY:

11 Q Mr. Schwefel, let me ask if I correctly understand
12 your answer to be that Mr. Kahn did report to you that he had
13 had discussions about commercial relationships, possible
14 commercial relationships, with Universal/MCA during the
15 fall of '81 and winter of '82; but that you are not sure
16 whether he told you contemporaneously of those discussions
17 or only after the event?

18 A That's correct.

19 Q Do I also understand your testimony to be that since
20 the time of those dicussions you have seen references to those
21 discussions in correspondence maintained by Coleco?

22 A That's correct.

23 Q Did Mr. Kahn mention the name of anyone at
24 Universal or MCA with whom he was having such discussions?

25 A Steve Adler.

1 Q Did you have any understanding from Mr. Greenberg
2 as to what was going to be discussed at that meeting as far as
3 he was concerned?

4 A Yes.

5 Q What was your understanding?

6 A My understanding was that they were going to have
7 a business meeting concerning the possibility of joint
8 business projects together.

9 Q Did those joint business projects include Universal/
10 MCA's plans to invest in Coleco?

11 A Among other things, yes.

12 Q Had Universal/MCA indicated any interest in
13 possibly acquiring Coleco?

14 A Possibly, among a number of things.

15 Q Had they gone so far to discuss the possibility
16 of reaching a merger agreement or an acquisition agreement
17 with Coleco?

18 A I don't know if the discussions went that far.
19 I know the discussions were they wanted to invest money in
20 Coleco in the form of a convertible instrument whereby if they
21 lent money to the company, it would give them the option to
22 buy stock in the company.

23 I did know that their interest was such they did
24 not want to purchase or be involved with less than 20 percent
25 control of the company.

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1 Q Was that some accounting reason?

2 A Whether it was accounting or they didn't want to
3 get involved with a minority interest, I'm not sure.

4 Q I take it during the fall of '81 and winter and
5 spring of '82 Coleco was interested in raising money, raising
6 capital, is that correct?

7 A That's correct.

8 Q Were its plans or its interest in raising capital
9 public?

10 A I believe they were. In fact, we did raise money
11 publicly.

12 Q When was that?

13 A In that time period we had -- prior to that or
14 shortly afterwards -- we sold some common stock. We also
15 sold bonds.

16 Q You're talking about the spring of '82?

17 A I don't remember the exact dates. Within probably
18 an 18-month time we had two different issuances; one of
19 common stock and the other of public indebtedness.

20 Q When Universal/MCA expressed an interest in making
21 an investment, it wasn't just out of the blue, it was in
22 connection with your publicly expressed plans to raise
23 additional capital?

24 A Yes, the company was always very, very heavily
25 dependent upon short-term indebtedness by its banks, and we

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24
1 wanted to increase the company's capitalization in order to
2 explore its business opportunities.

3 Q During the Las Vegas Consumer Electronics Show and
4 the New York Toy Fair or otherwise did Coleco have a target
5 date for the introduction of its ColecoVision game?

6 A Yes, I believe it was the spring or summer of 1982.

7 Q Did it advise the trade that it expected to begin
8 shipments at that time?

9 A That's correct.

10 Q When did Coleco determine to include a Donkey Kong
11 cartridge as part of the ColecoVision package, which it was
12 going to introduce?

13 A Probably shortly after it secured the rights from
14 Nintendo.

15 Q You mean shortly after it secured the oral rights?

16 A That's correct.

17 Q Did it ever have any plans to include any cartridge
18 other than Donkey Kong?

19 A I don't believe so.

20 Q During the fall of '81 and spring of '82 did
21 ColecoVision have any other major product entrants other than
22 ColecoVision?

23 MR. FAIRHURST: I have to object to the form of
24 the question on the grounds that it came across
25 to me as a tautology. Would you have it repeated

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1 Kaye, Scholer, and asked him for his advice.

2 Q Did you do anything else?

3 A Not that I can recall.

4 Q Did you give the Kaye, Scholer lawyer a deadline
5 for getting back to you?

6 MR. BODNER: At this point with regard
7 to any communications that I feel would be within
8 the privilege, I'll have to invoke.

9 MR. KIRBY: Mr. Bodner, I don't want to invade
10 in any way the attorney/client privilege, but I
11 wasn't asking for any substance of anything.

12 I was simply asking whether or not Mr.
13 Schwefel had asked Kaye, Scholer to respond next
14 month, next year. I was asking for a time frame.

15 I won't pursue it if you think that that in any
16 way invades the privilege.

17 MR. BODNER: Right now I think the question of
18 timing would impact on the privilege.

19 MR. KIRBY: I'll withdraw the question.

20 BY MR. KIRBY:

21 Q Mr. Schwefel, April 27, 1982, at that time was
22 there any particular reason for Coleco to resolve the newly
23 discovered claim by Universal rapidly?

24 A Absolutely.

25 Q What was the reason?

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A We were sitting in a very, very precarious situation. We were at the eve of shipping the ColecoVision system with a Donkey Kong cartridge. Any activity which would impede the successful introduction of this system would, in effect, blow us out of the water before we got started.

Q When Mr. Greenberg reported on his meeting with Mr. Sheinberg to you, did you ask Mr. Greenberg if he knew why Universal was raising this at this time?

A I don't recall.

Q Other than making the telephone to one or more Kaye, Scholer attorneys, what else did you do with respect to the Universal claim?

MR. FAIRHURST: I believe he testified he didn't do anything else.

MR. KIRBY: I'm sorry. If he did, I'm re-asking the question.

MR. FAIRHURST: No objection.

THE WITNESS: I didn't do anything else personally. I think I might have spoken to an SEC attorney to find out if I had any duty to disclose this problem at this time. I didn't do any work directly to get to the problem.

BY MR. KIRBY:

Q Did Coleco make any public disclosure of Mr.

A001588

1 Sheinberg's statements at the luncheon immediately after the
2 luncheon?

3 A No.

4 Q What was the next thing that you personally did
5 with respect to the Universal claim?

6 A I don't recall what I did next. I do know what
7 I recall in my mind is the next day I believe or shortly
8 afterwards of a telex coming in which set forth Universal/MCA's
9 claim concerning Donkey Kong.

10 MR. FAIRHURST: That too is marked as an
11 exhibit.

12 MR. KIRBY: I think that's marked as
13 Defendants' 9.

14 BY MR. KIRBY:

15 Q Mr. Schwefel, forgive me if I have asked this
16 before, but I don't believe I had. When Mr. Greenberg
17 reported on the meeting he had had on April 27th with Mr.
18 Sheinberg to you, which you've testified he did by telephone
19 shortly after that meeting, did he tell you that Mr. Sheinberg
20 said he was surprised, or had not known prior to that meeting
21 about Donkey Kong?

22 A No, I don't think he got into that during our
23 telephone call. I do think he did mention to us that we have
24 to take this very, very seriously because MCA is a very
25 litigious company; and he would suspect that they were not

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going to ignore the situation, and they were going to bring it to a head very, very quickly.

I think at the same time he expected to get something in writing from them very, very shortly.

Q It's your recollection Mr. Greenberg told you Mr. Sheinberg said that you would get something in writing shortly?

A Yes, I don't know if it was during that telephone conversation or subsequent to that.

I remember clearly in my mind him telling me of Sheinberg telling him how much he's invested in this mark, and they're very, very successful in litigation, and, gee, if we inadvertently get hurt out of it, he hoped we understood, and he didn't want this occurrence to interfere with any further business relationships we might have.

Obviously, they were going to pursue their rights and their claims. He had indicated that he had paid a lot of money for this property, and he was going to try to exploit it the best way he possibly could.

Q Let me show you what's been marked as Defendants' Exhibit 9, and ask you if that is the writing which you received from Universal?

A Yes.

Q Did you receive that to the best of your knowledge on or about April 28th?

1 A That's correct.

2 Q The day after this luncheon between Greenberg and
3 Sheinberg?

4 A Yes.

5 Q To the best of your present recollection, Mr.
6 Schwefel, at the time you received that telex had Coleco
7 completed its sale of debentures?

8 A I don't believe we had any public offering in
9 the works at that time. I could find out the exact dates
10 of the two public offerings that we did have. I don't
11 believe it happened at that time.

12 Q Mr. Schwefel, after Mr. Greenberg reported to you
13 on the luncheon meeting and prior to the receipt of
14 Defendants' Exhibit 9, did you have any discussions with
15 anyone at Nintendo or representing Nintendo about the
16 luncheon meeting?

17 A I don't recall the exact timing of my discussions
18 with Nintendo. It could have happened before we received the
19 telex.

20 Certainly, it happened shortly after the time that
21 we did receive the telex that I did have communications with
22 Nintendo, but I don't remember the precise moment that my
23 discussions took place.

24 Q On or about the period of April 27th, 28th, did
25 you have some discussions with Nintendo?

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1 A Oh, absolutely.

2 Q Did there come a time when you met with representa-
3 tives of Universal?

4 A Yes.

5 Q I'm talking clearly in our context about the
6 subject of Donkey Kong?

7 A Yes.

8 Q Prior to that meeting with representatives of
9 Universal you met with representatives of Nintendo?

10 A I think my meeting with both these individuals in
11 person took place about the same time.

12 Q Where was that meeting?

13 A Out on the West Coast at Universal/MCA's offices.

14 Q Other than you, who attended those meetings
15 representing Coleco?

16 A Fred Yerman.

17 Q Who is he?

18 A He's an attorney with Kaye, Scholer.

19 Q Who represented Universal at those meetings?

20 A Bob Hadl was there, and there was an attorney
21 named Steve Kroft.

22 Q Anyone else representing Universal?

23 A Not that I had met there.

24 Q Was there more than one meeting at this particular
25 point in time?

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1 A There were a series of meetings on May 6, a meeting
2 between Hadl, myself and Yerman; a meeting between myself,
3 Yerman and representatives of Nintendo; and there were joint
4 meetings.

5 There was a meeting afterwards, Hadl, myself and
6 Yerman and a woman named Loretta Sifuentes; meetings between
7 Nintendo and certain business people of Universal, which I
8 was not present at.

9 Q Kind of a floating meeting and series of meetings
10 around Universal on that day?

11 A Yes. I believe Steve Adler could have been meeting
12 with Nintendo.

13 MR. FAIRHURST: Could have been?

14 THE WITNESS: Could have been.

15 BY MR. KIRBY:

16 Q Do you recall who was there representing Nintendo?

17 A I believe there were three gentlemen there;
18 Howard Lincoln, another attorney from Howard Lincoln's
19 firm. I believe his name was Magee -- I don't remember his
20 first name, but his face sticks in my mind -- and at least
21 another attorney from Los Angeles.

22 Q Do you remember if Mr. Arakawa was there?

23 A Yes, Mr. Arakawa was there.

24 Q During the course of this floating series of meetings
25 did you express to any representative of Universal skepticism

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1 about Universal's claim of right with respect to Donkey Kong?

2 A I told them I thought they had a very, very weak
3 case. I had told them at that meeting or prior to the time
4 I didn't think they had any copyright claim at all, and that
5 any claim I could possibly see them having was a weak 43(a),
6 Lanham Act-type case.

7 Q Did you or any representative of Coleco ask them on
8 what basis they claimed any trademark rights in King Kong?
9 You can answer that yes or no.

10 A Can you repeat the question?

11 (Whereupon, the Court Reporter read back the
12 last question.)

13 THE WITNESS: I don't think we asked them
14 directly that question. I think they told us they
15 owned all the rights to King Kong. It was told to
16 us many times. At the time of the meeting between
17 Greenberg and Sheinberg; two, in the telex; three,
18 during my discussions with Robert Hadl preceding
19 that meeting; four, during my discussion with
20 Hadl and Loretta Sifuentes that day, at which time
21 they told me they had signed a license for King Kong
22 with a company named Tiger Industries, Inc., and
23 their assurance and Kroft's assurance that they
24 owned King Kong, and that's not even a question
25 we should be discussing.

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1 BY MR. KIRBY:

2 Q Did any representative of Nintendo directly
3 query the basis on which they claimed King Kong?

4 A Yes.

5 Q Who was that?

6 A Mr. Magee did.

7 Q Do you recall approximately what he said?

8 A Yes, during our meeting of the 6th he had asked the
9 question, "Well, how do we know you own what you say you own?
10 Do you want us to settle it?" One of the purposes of these
11 meetings --

12 MR. FAIRHURST: Can I infer that he is talking
13 about a meeting with MCA personnel? You did
14 testify to a bunch of meetings.

15 For clarity purposes, was this a meeting with
16 Nintendo personnel or Coleco, or is this a Coleco-
17 Universal-Nintendo meeting? It's not apparent from
18 the testimony.

19 THE WITNESS: Everybody was together at the
20 same time.

21 MR. FAIRHURST: Sorry for the interruption.

22 THE WITNESS: He had raised the question, "Do
23 you want us to pay some money to you? How do we
24 even know you own it?"

25 Both Hadl and Kroft were very, very quick to

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1 affirm, "Look, we own it. There's no question
2 about that. You have our warranty of title. We'll
3 be glad to spend as much time as you need in order
4 to assure you of that."

5 There was not a question in my mind of what
6 Universal and MCA owned based upon their discussions
7 or representations to us. Never conceived in my
8 own mind that they didn't own it.

9 BY MR. KIRBY:

10 Q Had you ever met Mr. Kroft before this date?

11 A No.

12 Q Who introduced Mr. Kroft to you, if you recall?

13 A Mr. Hadl.

14 Q Did he describe what Mr. Kroft's role was in the
15 King Kong saga, if I may be so bold?

16 A He had indicated there was litigation involved,
17 and he was involved in the litigation; and he also was
18 buttoning up making sure they had all the rights.

19 I think he was from the law firm of Rosenfeld & Meyer.
20 I wouldn't be surprised if they were the general counsel to
21 Universal/MCA. He was their trademark copyright specialist
22 who was involved in this whole project.

23 Q I'm asking you your specific recollection, Mr.
24 Schwefel. Did Mr. Kroft or anyone else representing Universal
25 at that meeting describe or refer to litigation between

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1 Universal and RKO with respect to King Kong?

2 A I don't believe any litigation was identified by
3 name. My prior answer came from the introductions as I came
4 into Mr. Hadl's room with Mr. Yerman. I think Mr. Yerman
5 knew Mr. Kroft before, and they shook hands.

6 By way of background, Mr. Hadl described to me the
7 nature of Mr. Kroft's role with Universal/MCA.

8 Q Now, on May 6th did Coleco reach any agreement
9 with Universal?

10 A We had an oral understanding to the effect that they
11 would grant us the ability to market our product without
12 the interference. The general, overall purpose was to have
13 a universal settlement of this matter between Nintendo,
14 Universal and Coleco.

15 Q When you say, "universal," just so the record is
16 clear, that's a small "u"?

17 A That's correct.

18 Q Go ahead.

19 A If that failed, they would enter into an arrangement
20 with us whereby we would not be put in jeopardy.

21 Q When you used the term, "Allow us to market our
22 product," is the product you're referring to Donkey Kong?

23 A That's right.

24 MR. FAIRHURST: Donkey Kong in what
25 configuration are you speaking of?

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MR. KIRBY: I'm speaking generally.

MR. FAIRHURST: Figurines, all Donkey Kong products?

MR. KIRBY: Whatever the subject of the dispute was at that time.

BY MR. KIRBY:

Q Was that oral understanding quantified in any way on May 6th? Do you understand what I'm asking?

A Yes, I believe we were talking about paying them a fee of about 3 percent of our sales in the event we had to enter into an agreement with them alone if there was not going to be a larger settlement agreement between all the parties.

Q Where did that figure come from?

A It was derived after a series of negotiations which were taking place at that time, and prior to that time during telephone conversations. I think that their first demand was wanting a royalty of 7 or 8 percent. Our objection to that, and our possibly counter offering I think a point or point and a half to two points; and it was the bottom line after a series of discussions.

Q Do I understand your testimony to be, Mr. Schwefel, that during the period from April 28th to May 6th there had been discussions back and forth between Universal and Coleco with respect to this subject, with respect to Donkey Kong?

A001598

1 A That's correct.

2 Q That a contingent arrangement had been reached by
3 May 6th that if a general settlement could not be reached,
4 that Universal would receive 3 percent on sales from Coleco
5 for its sales of Donkey Kong products?

6 A That's correct.

7 Q When we say, "Donkey Kong products" we're referring
8 to the Donkey Kong tabletop game?

9 A That's correct.

10 Q The home video game?

11 A That's correct.

12 Q Anything else?

13 A I don't believe so.

14 Q On May 6th did Coleco reveal to Nintendo that it had
15 reached a contingent agreement with Universal to pay
16 Universal 3 percent if there could not be a general
17 settlement?

18 A No, I don't think we had gotten to the nature of the
19 so-called bargain that he was trying to strike.

20 We did though indicate that look, if we can't
21 arrange a universal settlement, we would be forced to go ahead
22 and make any deal we possibly could. We were in much, too
23 much jeopardy.

24 Q Let me show you what's been marked for identification
25 as Defendants' Exhibit 10. It purports to be an agreement

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between Universal and Coleco.

Is that the agreement which Universal and Coleco entered into with respect to Donkey Kong?

A That's correct.

Q Did Coleco ever enter into any other written agreement with Universal with respect to Donkey Kong?

A I don't believe so.

Q Who prepared the original draft of Exhibit 10?

A Bob Hadl.

Q To the best of your recollection in what respects, if any, was that original draft modified after Coleco received it?

A There was some language changed. I had sent the document to Kaye, Scholer, and they had given me their input.

Q To the best of your recollection with the exception of paragraph three in that agreement were there any other changes made in the draft prepared by Mr. Hadl?

A Frankly, I'd have to compare both documents and the original draft to be able to give you any firm answer on that.

MR. KIRBY: Would you mark for identification a letter from Mr. Hadl to Mr. Schwefel dated May 17, 1982?

(Defendants' Exhibit 125: Marked for identification - described in index.)

A001600

1 with respect to the subject of Universal seeking an injunction
2 against Nintendo?

3 A Yes.

4 Q What was that agreement?

5 A The agreement was that Universal would not take any
6 action which would put Coleco's marketing efforts into
7 jeopardy.

8 They were aware we were concerned that the backlash
9 which might be produced by their suit against Nintendo
10 could have a negative effect upon our marketing efforts.

11 They assured me that they were going to try to
12 keep us out of it; and, two, minimize the damage to us.
13 They were not going to be seeing injunctive relief.

14 So, at least nobody would think there was any
15 immediate threat to Coleco's marketing of this product at
16 this time.

17 Q That agreement was not reduced to writing?

18 A No.

19 Q Was there any reason why that agreement was not
20 reduced to writing?

21 A No. As you could tell by the nature of these
22 documents, being an attorney and a sophisticated attorney,
23 this was a very, very bare bones type of agreement.

24 This was done almost in the heat of the night in
25 order to resolve this issue.

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We had suspected, and they had led us to the belief, they were going to be taking immediate action against Nintendo; and unless we were able to agree with them definitively at this time, we would get sucked into that action in some manner either by negative publicity or being a party to the action itself. We did not have very, very much time to react.

Q Were there any other agreements between Universal and Coleco which flushed out this bare bones agreement other than the one you testified about?

A No, there were no other written agreements.

Q Any other agreements which were not written which flushed this out?

A No, there were not.

Q So, the only side agreement that you recall today was the agreement with respect to not seeking any injunction against Nintendo?

A That's correct. Also they had agreed to let us take a look at any publicity that would be coming out concerning the announcement of the suit, and being able to insert language into that release which would indicate that Coleco was not the target of any action, and that Coleco was not in jeopardy.

Q As a matter of fact, when Universal did sue Nintendo, was Coleco given an opportunity to comment on the

A001602

1 press release?

2 A That's right.

3 Q Did it?

4 A Yes.

5 Q Did it make any suggestions as to language for the
6 press release?

7 A I believe we did put a sentence in there concerning
8 that Coleco was not a party to it.

9 Q Did Universal, prior to the time you entered into
10 this agreement, request that Coleco identify Universal on its
11 Donkey Kong packages?

12 A No.

13 Q Did the subject of identifying Universal publicly
14 in any way come up during these negotiations?

15 A Not to my knowledge.

16 Q Did Universal ask Coleco to do anything during the
17 course of these discussions other than to pay it money?

18 A That and trying to help get a settlement of the
19 greater matter between Nintendo and ourselves.

20 Our thought was hey, we did not want to see this
21 blow up even regarding Nintendo because it would have a
22 fallout effect upon us. That would be our greatest desire.
23 A sub, minor desire, if that failed was to try to protect
24 Coleco as best as it possibly could.

25 Q To make sure I understand your answer, Universal

A001603

1 asked you to do two things; pay it money, and try to get
2 Nintendo to enter into a settlement agreement with Universal?

3 A Absolutely.

4 Q Anything else Universal asked you to do?

5 A No, not to my recollection.

6 Q You testified that Universal agreed to do two things
7 that were not in the agreement; one with respect to the
8 injunction against Nintendo, and the other with respect to
9 publicity with respect to any lawsuit against Nintendo.

10 Other than that did Universal promise to confer any
11 other benefits on Coleco for signing this agreement?

12 MR. FAIRHURST: I'll have to object to the
13 form of the question of benefit. It's vague.
14 Maybe you want to keep it vague.

15 THE WITNESS: Promise is a very direct word.
16 Remember, we were having other discussions at the
17 same time this came up. Discussions concerning
18 future business relationships between the companies.

19 Obviously, although no promise or agreement
20 or covenant could be secured, an atmosphere of good
21 will between the two companies would certainly be
22 conducive to allow any of the other business
23 relationships to be established.

24 BY MR. KIRBY:

25 Q Specifically, did Universal, for example, make

1 available any marketing advice to Coleco?

2 A No.

3 Q Did it make available any advice with respect to
4 package design?

5 A No.

6 Q Did it make available any advice with respect
7 to distribution channels?

8 A Absolutely not.

9 Q Did it make available any advice with respect to
10 advertising?

11 A No.

12 Q Other than those things that I mentioned, which
13 you testified they did not make available, are any other
14 things specifically related to the Donkey Kong product that
15 Universal promised Coleco in exchange for the money that
16 it received from Coleco?

17 A Yes, there was one other thing. It concerned
18 Tiger. They indicated they would get Tiger to change the
19 nature of their game if we were unhappy with it.

20 Q Anything else?

21 A Not that I know of.

22 Q After Coleco signed the agreement with Universal,
23 which I take it was on or about May 12, 1982, did Coleco
24 inform Nintendo that it had signed such an agreement?

25 A Yes.

A001604

1 Q When did it inform them?

2 A Shortly after signature.

3 Q Did it furnish Nintendo with a copy of the agreement?

4 A No.

5 Q Was there any reason why?

6 A It was an agreement between myself and Hadl that the
7 agreement would be kept confidential.

8 Q Who requested that the agreement be kept
9 confidential?

10 A I really don't recall. I think it was a mutual
11 agreement.

12 Q Prior to April 27, 1982 had Coleco ever heard of
13 Tiger Electronics?

14 A I'm sure, as a corporation, we did. They were
15 competing with us in the marketplace.

16 Q Had you ever heard of them?

17 A No.

18 Q When did --

19 A Not that I can recall. Possibly I did.

20 Q I understand. You're answering to the best of
21 your recollection?

22 A Sure.

23 Q When to your knowledge did Coleco first become
24 aware that Tiger was going to make an electronic game called
25 King Kong?

A001605

MR. FAIRHURST: Objection; form.

51

The witness has testified that he has no personal knowledge, cannot speak for the rest of the company. So, therefore, he cannot answer the question.

BY MR. KIRBY:

Q Go ahead and answer the question.

A On or about May 6th, maybe shortly before. Certainly by May 6th.

Q How did you find out that Tiger was going to market a King Kong game?

A I believe I found out from Greenberg or Bob Hadl. Mr. Greenberg found out from Sid Sheinberg or Bob Hadl.

Q When you first heard about the Tiger King Kong game, what were you told about it?

A I was told that Universal/MCA had signed previously a licensed agreement for King Kong for a video game with Tiger, but that Tiger was in breach of that agreement, and that agreement was to the effect null and void.

Q That was what you were first told about it?

A That's correct.

Q Anything else at that time?

A I think we were told -- it came up after the 27th and before the 6th. I think Universal was embarrassed by not making it known to us beforehand. I think they explained to us they weren't aware what was happening.

A001606

CUNNINGHAM

1 It was done by the Merchandising Department,
2 and it just came to their attention. They tried to show their
3 good faith to us.

4 Q What did Coleco do with respect to that information?

5 A Well, it gave me pause for thought in two regards;
6 one, how could Universal license them, and they would be able
7 to give us a covenant not to sue. Wouldn't it subject them
8 to some hostile activity by Tiger based upon a breach of their
9 exclusive agreement?

10 MR. FAIRHURST: I'll have to object to the
11 witness' testimony. I think he was asked what he
12 did, not his thought process.

13 If he's giving us his thought process, I don't
14 think anyone is interested in that. Maybe I
15 misunderstood.

16 BY MR. KIRBY:

17 Q Go ahead and continue your answer, and you can put
18 your objection on the record at the conclusion of it.

19 Would you like to have it read back?

20 A No, I can keep going.

21 MR. FAIRHURST: That's why I'm objecting.

22 BY MR. KIRBY:

23 Q Go right ahead, Mr. Schwefel.

24 A Anyhow, with that framework in mind, knowing that
25 there could be problems, I spoke to Bob Hadl to inquire what

A001607

1 is this all about? He then went into a litany about how it
2 was done, and it has no respect anymore because they were
3 supposed to give them samples of products, and they never
4 gave them, and they breached the agreement, and they were
5 sending them a letter informing them that the agreement was no
6 longer in effect. Therefore, it would not prohibit them from
7 making an understanding or arrangement with us with
8 Nintendo.

9 Q Did you make any request to see the Tiger game?

10 A Yes, I wanted -- or we wanted -- to find out
11 exactly what we were faced with. We wanted to find out if the
12 were making a game based upon the copyrights of Nintendo,
13 and to see whether we would be faced in the marketplace with
14 a knockoff or lookalike of our game.

15 Q What did you do to satisfy yourself with respect
16 to that subject?

17 A We eventually sent an attorney out to Chicago
18 who viewed their game. He reported back.

19 MR. BODNER: I want to caution the witness
20 with respect to communications between Coleco
21 attorneys and Mr. Schwefel and I'm going to invoke
22 the privilege.

23 MR. FAIRHURST: May I make an observation?
24 It may be premature. If he sent an attorney to
25 Chicago to inspect the game, and the attorney gives

A001608

1 Q Have you seen this letter prior to today?

2 A I believe so.

3 Q Was Kaye, Scholer on May 14, 1982 your counsel with
4 respect to Donkey Kong?

5 A That's correct.

6 Q To your knowledge was this letter sent prior to a
7 Kaye, Scholer lawyer reviewing the Tiger King Kong game?

8 A Frankly, I don't recall.

9 Q What to your knowledge happened after this letter
10 of May 14, 1982 with respect to the Tiger King Kong game?

11 A Not very much. The matter was really dropped.
12 I think there was a discussion between myself and Howard
13 Lincoln of Nintendo -- he was an attorney for Nintendo at that
14 time -- concerning the matter.

15 I think it was my observation to him that it didn't
16 make any sense for either he or our company to pursue the
17 matter further.

18 Q Did you state to him any basis for your opinion that
19 it didn't make any sense for anyone to pursue it further?

20 A Yes, I told him it was my understanding that the
21 game which they were developing was rudimentary in nature;
22 and if they changed it in any degree, it would only have the
23 possibility of making it less rudimentary and a more realistic
24 work that would compete with Coleco.

25 Q I'm not sure I understand your answer. Did you

A000715

1 express any opinion to him as to whether or not the game looked
2 like the Donkey Kong game?

3 A We talked about it having certain elements which were
4 the same. It was a close question as to whether it was an
5 infringement upon the Nintendo copyrights, in my opinion.

6 If they did change it to get it further away from the
7 copyrights, maybe they would come out with a product which
8 would hurt Coleco's marketing efforts more.

9 Q I think I'm understanding, but I'm not quite sure,
10 Mr. Schwefel.

11 Do I understand your testimony to be that you
12 told Mr. Lincoln that it was a lousy copy?

13 A Words to that effect. I don't know if I used the
14 word "copy." I thought it was a lousy game.

15 Q By that you mean with respect to graphics?

16 A Graphics and game play.

17 Q You did express the general opinion that it was a
18 lookalike or similar, though rudimentary?

19 A It certainly was a lookalike.

20 Q Did Coleco ever, in fact, take any action against
21 Tiger Electronics?

22 A No, we did not.

23 Q Was Coleco forbidden by any agreement with
24 Universal from seeking any relief against Tiger Electronics?

25 A No, I don't think so. I think my discussions with

A0000716

1 them were if it offended you, we'd get them to change it.

2 Q Who made that statement to you?

3 A The gravamen of my discussions with Universal/MCA.

4 Q To your knowledge did Universal after May 14, 1982
5 require Tiger to make any changes in the game?

6 A I have no understanding.

7 Q Can you put any time frame on when you had the
8 discussion with Howard Lincoln to which you testified?

9 A I think in the May period of time. A little after
10 maybe, but I think in that time frame.

11 Q As of May 1982, was there a Coleco Donkey Kong
12 game that was playable that you could see?

13 A I'm trying to think. We first started shipping a
14 Donkey Kong cartridge for the Atari video game system. I don't
15 know in the May time period if it was out, or did we come out
16 with it in June. I don't have a precise understanding of
17 the timing.

18 MR. FAIRHURST: Would you read back the last
19 question and answer?

20 (Whereupon, the Court Reporter read back the
21 last question and answer.)

22 BY MR. KIRBY:

23 Q Mr. Schwefel, was the conversation you had with
24 Mr. Lincoln after you had an opportunity to see yourself,
25 or have a report on the actual game play of a Tiger King Kong

A001611

1 game as compared to a Coleco Donkey Kong game?

2 A I believe it was.

3 Q Well, when you say, "I believe it was," do you know
4 that you had seen or had reports on the game play of both
5 before you had that conversation with Mr. Lincoln?

6 A Yes, I know that I had a conversation with
7 Mr. Lincoln after I got a report about the game. What's
8 doubtful in my mind, I don't know if I had a conversation
9 with Mr. Lincoln before I saw it.

10 Q The conversation in which you expressed the opinion
11 that a lawsuit might be counterproductive because it might
12 change the game for the better was after?

13 A That's correct.

14 Q Mr. Schwefel, I take it that under the May 12th
15 agreement with Universal, as reflected in the affidavits
16 which you reviewed at the beginning of this deposition,
17 Universal has received payments from Coleco, is that correct?

18 A That's correct.

19 Q Has Universal received payments from Coleco with
20 respect to anything other than Donkey Kong cartridges for the
21 Coleco, Mattel and Atari home video systems and the Donkey Kong
22 tabletop game?

23 A Possibly.

24 Q What else?

25 A Possibly could have included payment for sums which

A001612

1 A He could have used the word "equitable."

2 Q Did he state there was any legal basis for his
3 demand?

4 A Sure, if the agreement pertains to Donkey Kong,
5 it would give them legal right to include payments for all
6 reasonable extensions of that.

7 Q Did Universal spend any money in connection with
8 Coleco's development of any Donkey Kong products after the
9 May 12th agreement of 1982?

10 A I don't believe they spent any money at any time.

11 Q Did Universal encourage Coleco to develop further
12 Donkey Kong products such as Donkey Kong, Jr.?

13 A No.

14 Q Did Coleco, prior to April 27th, 1982, have any
15 plans with respect to Donkey Kong other than to develop
16 the home cartridges, video cartridges, and the tabletop
17 game?

18 MR. FAIRHURST: Prior to what date?

19 MR. KIRBY: Prior to April 27, 1982.

20 THE WITNESS: Possibly we could have used a
21 trademark and the copyright with regard to certain
22 other products. We normally do that if we have a
23 mark. We'll try to incorporate the mark in as many
24 products as we possibly can to maximize the use of
25 that mark in the advertising and good will that

A001613

1 BY MR. KIRBY:

2 Q Can you tell me the basis for the allegation?

3 A With regard to the second half of your question,
4 I think them having a booth at the show would be a matter of
5 public record. Concerning their attendance at the show,
6 I'm relying upon conversations I had with other people who
7 informed me of their presense.

8 Q Such as Al Kahn?

9 A And other people in the sales marketing department.

10 MR. KIRBY: Would you please mark for
11 identification as Defendants' 127 the complaint
12 filed in the United States District Court for the
13 Southern District of New York entitled, "Coleco
14 Industries, Inc. against Universal City Studios,
15 Inc., 84 Civil 2596"?

16 THE WITNESS: Yes, I have seen this
17 document before.

18 (Defendants' Exhibit 129: Marked for
19 identification - described in index.)

20 BY MR. KIRBY:

21 Q Referring you specifically to paragraph 19 of the
22 complaint, Mr. Schwefel, can you tell me the basis for the
23 assertion that Universal knew that it was placing Coleco in
24 a position in which it would be compelled to seek an
25 immediate agreement with Universal in order to insure the

A001614

1 survival of its ColecoVision marketing plans and to protect
2 its economic viability and business reputation if that
3 basis is anything other than that which you've previously
4 testified to today?

5 A I can add some more to what I testified to today.

6 Q Please.

7 A As we were re-entering the home video game market
8 at the Toy Fair in 1982 in February, we were showing certain
9 product which we had planned to manufacture and produce.
10 Product which was based upon coin-operated games, which
11 were originated by a company named Centuri.

12 During the Toy Fair itself there appeared an
13 article in the Wall Street Journal to the effect that Coleco
14 did not have the right to do so, and the rights to reproduce
15 in the home market of those products was given to Atari.

16 This was very, very embarrassing to the company and
17 very, very harmful to the company. As evidence of that, the
18 company's stock was severely hurt.

19 People were questioning our ability to secure a
20 licensed product in order to compete in the manner that we
21 wanted to compete in the home video game market.

22 To help you understand that statement, Coleco's
23 system was the third major system brought out. The first
24 system was Atari, and Atari's was the first and probably the
25 most popular; and its graphic display was more rudimentary

A001615

1 than the system we were trying to bring out. Mattel was the
2 second major player in the video game market. They had better
3 graphic display than Atari's system did, but they were not
4 marketing their product with coin-operated arcade games.

5 We felt our niche in order to be able to market
6 this product successfully, was coming out with a product
7 which had good graphic display, graphic display which we felt
8 was certainly better than Mattel's, and, obviously, much
9 better than Atari's although Mattel would question part of that
10 statement.

11 Also at the same time give the consumer the
12 ability to play the same games at home that he was playing in
13 the coin-operated video parlors.

14 Now, without the ability to deliver the coin-
15 operated licensed product, our marketing thrust would be
16 very severely destroyed.

17 The announcement by Centuri that their letter of
18 understanding with Coleco was only a letter of intent, and
19 they decided to do business with Atari hurt Coleco very,
20 very much.

21 What would have hurt Coleco much more severely
22 was that we would not be able to ship our system with the
23 included cartridge of Donkey Kong. I'm not so sure we
24 could have survived that type of a threat to us, obviously,
25 in this part of the business.

A001616

1 Q Mr. Schwefel, part of the allegation in paragraph
2 19 goes to Universal's knowledge of that to which you just
3 testified. What is Coleco's basis stating Universal
4 understood or knew what you had testified to?

5 A Besides our public announcements and public shows
6 which they would have been privy to, there were conversations
7 between Al Kahn and Universal/MCA, and Greenberg and
8 Universal/MCA, which, in effect, told them we were going to
9 be a major player in this market. They should support us.

10 Now, obviously, we would have told them our
11 marketing plans, and the importance of our position in the
12 marketplace at that time, and how we felt that not only
13 would we survive in this business, but we would flourish
14 and do very, very well and, therefore, they should consider
15 giving their immense library of properties to us to use for
16 coin-operated games instead of Mattel or Atari.

17 Q These were the same conversations in which
18 Universal/MCA was discussing purchasing the debenture
19 which would give it as much as a 20 percent or more than a
20 20 percent interest in Coleco?

21 A I'm not so sure those discussions would have taken
22 place with Al Kahn, but certainly with Mr. Green it would have

23 Q Mr. Schwefel, just for the record, you have been
24 very kind in making yourself available for this deposition
25 prior to the upcoming trial in this matter.

A001617

AFTERNOON SESSION

2:30 O'CLOCK P.M.

M I C H A E L S . S C H W E F E L ,

resumed the witness stand and testified further on
his oath as follows:

DIRECT EXAMINATION

CONTINUED BY MR. KIRBY:

Q Mr. Schwefel, I just have a few more questions
at this time. With respect to the Tiger game, when the
existence of the Tiger King Kong game was first revealed to
Coleco by Universal during the period around April 27 to
May 6, 1982, did Universal ever state to Coleco that the
Tiger game was an imitation, a copy, or words to that effect,
of the Donkey Kong game?

A I think the language which was used was "of a
similar nature."

Q Who used that language?

A Bob Hadl would have to me.

Q Did you ask to see the agreement between Universal
and Tiger?

A Yes.

Q Were you shown a copy of that agreement?

A No.

Q Yes or no?

A001618

1 Q Is it fair to say as you sit here today, you have
2 never met Mr. Sid Sheinberg?

3 A That's unfair.

4 Q You met him when?

5 A I met him, I believe, during the time frame.

6 Q In '82?

7 A On the May 6th meeting he could have been there.
8 I met him subsequent to that at another meeting that he
9 arranged after this matter was settled.

10 I met him at least twice.

11 Q At the time of the April 27th phone call that you
12 testified to earlier that you had with Mr. Greenberg, you had
13 not met Mr. Sheinberg, correct?

14 A That's correct.

15 Q What you were relating in response to Mr. Kirby's
16 question was your recollection of what Mr. Greenberg then told
17 you?

18 A That's correct.

19 Q When you testified just as you did, that you met
20 Mr. Sheinberg subsequent to that on some unrelated matters,
21 unrelated to Donkey Kong, is that what you meant?

22 A That's correct.

23 Q Was that in connection with an E.T. possibility of
24 Coleco licensing E.T. products from MCA?

25 A That's correct.

A0000717

1 Q Did you also meet with Mr. Spielberg at that time?

2 A That's correct.

3 Q Who else was at that meeting?

4 A Mr. Wasserman, Mr. Hadl, Mr. Newman, Mr. Kahn,
5 Mr. Greenberg, myself and possibly Eric Bromley.

6 Q Can you tell us when that meeting occurred?

7 A I think in the summer of that year.

8 Q If I suggested to you it was in July, would that
9 refresh your recollection?

10 A July is in the summer.

11 Q Towards the end of July?

12 A I don't know exactly.

13 Q In any event, this was sometime after Coleco had
14 signed an agreement with Universal with respect to King Kong,
15 is that correct?

16 A Yes.

17 Q I would ask your attorney to put in front of you
18 your affidavit. This is paragraph four. You state that
19 your attorneys had advised you that any claim Universal would
20 have of infringement over Donkey Kong was weak. When did you
21 receive the advice?

22 A Prior to the May 6th meeting.

23 Q Did you understand that your attorneys had
24 undertaken or commissioned a trademark search of King Kong
25 by that time?

(Whereupon, the Court Reporter read back the last question.)

MR. FAIRHURST: Execution of the agreement between Coleco and Universal.

THE WITNESS: That's correct.

BY MR. FAIRHURST:

Q Were you the one who advised Nintendo or Nintendo representatives of the fact?

A I advised Nintendo's attorney.

Q Who is that attorney?

A Mr. Lincoln.

Q Do you remember how you advised him; orally or in writing?

A Orally.

Q Do you remember when it was?

A After we signed it.

Q That day or thereafter?

A A few days, I think. It could be that day. It could have been a day or two afterwards.

Q Mr. Lincoln requested at that time a copy of the agreement, did he not?

A That's correct.

Q You declined to produce it?

A That's correct.

Q Your reason for doing so, you did not want to

A001619

1 disclose you had agreed to a 3 percent royalty?

2 A Not necessarily so.

3 Q What were the reasons you declined to disclose it to
4 Mr. Lincoln?

5 A Because it was an agreement between myself and
6 Bob Hadl that would be kept confidential.

7 Q You requested Bob Hadl to keep it confidential,
8 did you not?

9 A I think I testified we mutually came to a decision
10 to keep it confidential.

11 Q When did you come to that decision?

12 A During a telephone conversation I had with Mr.
13 Hadl.

14 Q When was that?

15 A Around the date that we signed the agreement.

16 Q Did you advise Mr. Bromley prior to June 4, 1982
17 that Universal and Coleco had signed a contract having to do
18 with King Kong?

19 A I'm sure he was aware of it.

20 Q Why are you sure he was aware of it?

21 A I think I advised him.

22 Q The answer to my question is yes, you did?

23 A I believe so.

24 Q Do you remember how you advised Mr. Bromley?

25 A I think in the conversation.

A001620

1 last question.)

2 MR. FAIRHURST: That's the question.

3 MR. KIRBY: I object to the form. I don't
4 understand it.

5 If the witness understands it, the witness,
6 obviously, can answer.

7 I'm in no position to instruct the witness
8 either way.

9 For the sake of all of our records, I would
10 caution that the witness should not put a meaning
11 on the question. He should, if he understands the
12 question, obviously, answer it; but he shouldn't
13 attempt to reformulate it in his own mind before
14 answering it. That way none of us knows what he's
15 answering.

16 THE WITNESS: Quite possibly, yes.

17 BY MR. FAIRHURST:

18 Q Could you explain to me how that could be quite
19 possible?

20 A Sure. Well, I wasn't present during the negotiations
21 between Nintendo and Coleco concerning Donkey Kong, Jr.
22 I do know that the royalty which is being charged us is a
23 higher royalty than we did pay on Donkey Kong itself. The
24 initial payment terms, as presented in this memorandum, are
25 higher than what we went ahead and paid for Donkey Kong

A0000719

1 itself.

2 Now, I can't put myself into the heads of Nintendo,
3 and I don't know what was on their minds when they negotiated
4 this agreement.

5 What's quite possible, they charged us more because
6 of the position we took vis-a-vis Universal and Nintendo as
7 represented by the settlement agreement, or the agreement
8 to be signed, however you want to term it.

9 Q Did you have discussions yourself, Mr. Schwefel,
10 with any Nintendo representatives with respect to the
11 question whether Nintendo would indemnify and hold Coleco
12 harmless in the event Universal sued Coleco over King Kong?

13 A Yes.

14 Q With whom did you have those discussions?

15 A Mr. Arakawa, Mr. Lincoln, and I believe Mr. Magee,
16 and one other representative from Nintendo.

17 Q Were these discussions separate ones, or did they
18 all occur at the same time with all those persons in one
19 room at the same time?

20 A I had one discussion with all those people at the
21 same time, and I think I had additional conversations with
22 Howard Lincoln on the same subject.

23 Q When was the first of those discussions?

24 A The first of the discussions, I believe, I had a
25 telephone conversation with Howard Lincoln prior to the

1 or shortly afterwards. We did talk about it in that time
2 frame.

3 Q In any event, prior to the meeting of May 6,
4 which I believe you testified occurred in Los Angeles,
5 the series of meetings that day, prior to that series of
6 meetings you did have a discussion with Mr. Lincoln on the
7 subject, is that correct?

8 A I believe so.

9 Q Tell me what you asked Mr. Lincoln.

10 A For indemnification.

11 Q What did he tell you?

12 A He would take it under advisement, and discuss it
13 with his client.

14 Q Did you subsequently hear back from Mr. Lincoln?

15 A I renewed my request for it during our May 6th
16 meeting. After the May 6th meeting he told me that although
17 they might consider it further, at this time the answer was no.

18 Q In other words, you had this telephone call --
19 irrespective of who placed it -- sometime before the May 6th
20 meeting. Mr. Lincoln told you that it would be taken under
21 advisement with his client, and he got back to you at the
22 May 6th meeting, is that correct?

23 A No.

24 Q When did he get back to you?

25 A After the May 6th meeting.

A0000721

1 Q You did not discuss it on the May 6th meeting?

2 A We did, but I did not get a definitive answer on
3 May 6th.

4 I made my request to Mr. Arakawa who was the
5 principal of the company at the time, as well as Mr. Lincoln
6 and everybody else. My exact words, "Guys, we're standing
7 here naked. Aren't you going to give us any comfort at all?"

8 Q They told you no?

9 A They didn't tell me anything at that time.

10 Q They subsequently told you no?

11 A That's right.

12 Q To get the sequence correct, you spoke first with
13 Mr. Lincoln. The next time you had occasion to discuss it
14 with anyone from Nintendo was at the May 6th meeting when
15 you brought it to Mr. Arakawa's attention?

16 A As well as Mr. Lincoln's. We were in the same room
17 at the same time.

18 Q Who was there?

19 A Mr. Lincoln, Mr. Arakawa, Mr. Yerman and the other
20 attorneys from Nintendo, Mr. Magee -- and I forget the other
21 gentleman's name.

22 Q This was the meeting out of the presence of
23 Universal representatives?

24 A Correct.

25 Q Did this meeting occur subsequent to the first of

A 000722

1 having to do with the impairment of Nintendo's trademarks
2 in Donkey Kong?

3 A You're bringing it to a very high plane. Could
4 I answer it in my language?

5 Q I'll give you a chance to answer it.

6 A I can't.

7 Q You don't have any knowledge?

8 A I can't answer your question.

9 Q You know of such a document?

10 A I can't answer your question.

11 Q Do you have knowledge of an oral complaint?

12 A Yes.

13 Q What's that knowledge based on?

14 A I think Nintendo orally has let us know that we
15 have hindered their marketing effort on their licensing
16 program by our entering into the agreement that we did with
17 Universal.

18 Q Who so advised you?

19 A Possibly Mr. Bromley, possibly Mr. Kahn, and
20 possibly I heard it directly from Howard Lincoln.

21 Q You didn't hear it from Mr. Magee, is that correct?

22 A No. After my conversation I believe on the 6th
23 I don't know if I ever had any direct conversations with
24 Mr. Magee afterwards.

25 Q Has Coleco taken a position with respect to that

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1 Universal representatives sometime in July 1982 in respect to
2 some dealings over E.T., is that correct?

3 A I think you supplied the date.

4 Q It was in the summer of '82, I believe?

5 A Yes, spring or summer.

6 Q How did that come about?

7 A What do you mean?

8 Q How did you find yourself at Universal or in
9 California to do this? What were the circumstances that
10 brought you there?

11 A We had a meeting with representatives of MCA
12 Universal, and Steven Spielberg, in order for us to see if
13 we could secure the rights to make a cartridge based upon
14 the movie E.T.

15 Q Who held those rights to your knowledge?

16 A To this day I'm not terribly sure whether it was
17 Spielberg, Warner or Universal/MCA.

18 Q You were proposing a deal with Universal at that
19 time, is that correct, if the E.T. property became
20 available?

21 A That's right. I think they had the merchandising
22 rights, but they needed the approval of the other powers.

23 Q Do you know subsequently what happened to those
24 rights?

25 A Yes, I think they were secured by a company known

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1 would have learned it in that time frame even though I
2 don't have a specific recollection as to the exact moment in
3 time I discovered it.

4 Q You're reconstructing that from what your habits
5 are and what your logic tells you?

6 A Exactly.

7 Q You have no present recollection of knowing that
8 at that time?

9 A I don't remember the instant when I first read
10 it.

11 Q Tell us if you can, Mr. Schwefel, what you recall
12 Mr. Greenberg telling you before he went out to California
13 to meet with Mr. Sheinberg on April 27, 1982.

14 A I don't know if they met on the 27th in
15 California. I think I testified I wasn't sure whether it was
16 the East Coast or the West Coast.

17 Q Before they met, I'll accept that. Putting aside
18 before they met, what you recall his having told you prior
19 to the meeting?

20 A I think we had a general discussion as to the nature
21 and purpose of the visit, to explore possible business
22 relationships among the company vis-a-vis their library
23 of titles and copyrights, and getting in a joint venture
24 type agreement where we would exploit that in the video game
25 market.

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1 I think he also mentioned a desire of making an
2 investment in the company.

3 Q Did you yourself participate in any discussions
4 with Universal personnel over the possibility of Universal
5 acquiring an equity interest in Coleco?

6 A Depends what time frame.

7 Q Let's take it for the period April 1982 as a
8 starter.

9 A No, I did not.

10 Q At some subsequent time?

11 A I possibly could have had a conversation in June
12 of that year.

13 Q June of '82?

14 A With Bob Hadl.

15 Q Subsequent to that?

16 A I don't recall.

17 Q Do you recall having had any discussions with
18 Mr. Stanley Newman on the subject of Universal possibly
19 backing a partner of Coleco, or joint venturer with
20 Coleco with respect to the sale and distribution and
21 merchandising of MCA titles?

22 A The only time I ever spoke to Mr. Newman was in that
23 meeting that you described to me in July 1982 concerning E.T.

24 Q That was the only discussion you had?

25 A I haven't had any discussions with him on any

1 matters before or after that.

2 Q Did you hear from Mr. Greenberg that Universal and
3 Coleco were discussing the possibility of joint ventures or
4 partnerships over the distribution and sale of MCA
5 properties in ColecoVision form?

6 A Yes, I told you already yes.

7 Q That was back in April 1982, but subsequent to
8 that?

9 A We were continuing. In fact, at one point in time
10 I think I prepared a joint venture draft of an agreement
11 which I sent out to Mr. Hadl.

12 Q Do you remember was this approxiately in July
13 1982?

14 A Probably was earlier than that. Maybe it was later.
15 I don't remember the date.

16 Q You were the draftsman of that proposal?

17 A A girl named Lynn Fruchter of the Kaye, Scholer
18 office drafted that.

19 Q You sent it to Mr. Hadl?

20 A For his review.

21 Q That was a joint venture agreement?

22 A Yes.

23 Q Was there also a partnership agreement?

24 A To me joint venture and partnership are the
25 same.

1 Q Was there a draft that you prepared or had
2 prepared under your auspices of a proposed joint venture
3 agreement? Let's focus on that first.

4 A Yes.

5 Q Was there also a draft of essentially the same
6 concept, but implemented by virtue of a partnership as
7 opposed to a joint venture?

8 A Not that I can recall.

9 Q You believe this was in July or thereabouts in
10 the summer of 82?

11 A Could have been May, June. Could be in that time
12 frame.

13 Q To your knowledge does Coleco currently have
14 any discussions underway with Universal or a joint venture
15 proposal?

16 A Not that I'm aware of.

17 Q When to your knowledge did these break off?

18 A I think they broke off shortly after the meeting
19 concerning E.T. It just died.

20 Q If I told you, if I represented, that meeting
21 was sometime in July 1982, that would be when the talks
22 began to die?

23 A That's right.

24 Q What about with respect to the discussions between
25 Coleco and Universal regarding Universal possibly acquiring

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1 A Would you rephrase it? You asked me what your
2 understanding was.

3 Q Sorry. Strike the question.

4 You testified, and correct me if i'm wrong, this
5 morning, that when you met with Bob Hadl and others at
6 Universal on May 6, 1982, Mr. Hadl introduced you to
7 Mr. Kroft by referring to the fact that Mr. Kroft had
8 handled the King Kong litigation, is that correct?

9 A I thought he talked about matters, not litigation.
10 It was more general than that.

11 Q I believe you used the term "litigation." If you
12 wish to change it, that's fair enough. I'm not hanging
13 on a fine point. I'm reasonable certain you did.

14 A What I meant was he was in charge of the legal
15 relationship of King Kong of which litigation would be one
16 small part of it.

17 Q He did, as far as you can recall, tell you that
18 Mr. Kroft had been responsible for the King Kong
19 litigation in some way?

20 A I think that's correct. I can't recall the
21 exact words. That was by putting various statements
22 together, I would certainly get to that conclusion.

23 Q Now, Mr. Hadl also told you that if there were
24 questions about Universal's rights in King Kong, they could
25 be addressed to Mr. Kroft, did he not?

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1 A It was more like Mr. Kroft gave his assurances
2 it's not even something you would want to spend very, very
3 much time in because it was such an open and shut thing.

4 Q There was a discussion, was there not, of the
5 meeting between yourself and Mr. Yerman --

6 A Yes.

7 Q And Mr. Hadl and Mr. Kroft on the other side of the
8 table, as it were?

9 A Yes.

10 Q Over Universal's claims at that point, potential
11 claims, against Coleco?

12 A It was a multi-sided table because Nintendo was
13 also there.

14 Q In any event, there was a reference to Universal
15 having litigated the subject of King Kong rights, is that
16 correct?

17 A Now, that part was probably not at that time.
18 I told you there were two different stages of the meetings.
19 First when I met Mr. Kroft, and then when Mr. Kroft met with
20 the Nintendo people.

21 Now, the question of title came up specifically
22 by Mr. Magee when we were meeting, and Mr. Kroft gave his
23 assurances that was not a problem.

24 Q Didn't Coleco ask Universal for an indemnification
25 against claims by third parties over King Kong?

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